

July 15, 2013

## Treasury Revises FATCA Implementation Timeline

*IRS notice postpones FATCA withholding by six months and revises other key deadlines.*

On July 12, the IRS issued Notice 2013-43 (the Notice), in which it revised several key dates relating to the implementation of the Foreign Account Tax Compliance Act (FATCA), which was enacted as part of the Hiring Incentives to Restore Employment (HIRE) Act of 2010.<sup>1</sup> The Notice, released just months after the issuance of final regulations governing the implementation of FATCA, generally postpones by six months several key FATCA start dates set forth in the final regulations, including withholding and diligence obligations. It also expands the scope of “grandfathered obligations” to reflect the delayed start of withholding.

### FATCA Overview

FATCA is an anti-tax evasion statute designed to force the disclosure to the IRS of information concerning offshore financial accounts held by U.S. persons. To accomplish this goal, FATCA imposes a 30% withholding tax on certain U.S. source income and gross proceeds (known as “withholdable payments”) paid to foreign financial institutions (FFIs) and certain other types of non-U.S. entities, unless the recipients of such payments certify to the withholding agent making such payment that no such withholding is required. In the case of an FFI that seeks to avoid withholding tax on a payment, the FFI must become a “participating FFI” by entering into an agreement with the IRS. The FFI agreement obligates the FFI to perform diligence to uncover its accounts owned by U.S. persons and report information regarding these accounts to the IRS. The agreement also requires the FFI to withhold tax on certain payments made to “recalcitrant” account holders and to nonparticipating FFIs (i.e., FFIs that have not entered into agreements with the IRS).

In order to establish an alternative means of complying with FATCA, the U.S. Department of the Treasury (Treasury) has been actively engaged in efforts to establish “intergovernmental agreements” (IGAs) with other countries for the implementation of FATCA. The IGA approach is intended to overcome local law obstacles that might prevent compliance with FATCA and to generally reduce the FATCA compliance burden on FFIs. During 2012, the Treasury released two “model” IGAs,<sup>2</sup> and several countries have already entered into IGAs with the United States. These IGAs may, depending on the “model” used, override certain aspects of the final regulations. For instance, if a “Model 1 IGA” applies to a jurisdiction, an FFI located in that jurisdiction (i) will not be subject to withholding on payments it receives; (ii) will not be required to enter into an FFI agreement with the IRS; and (iii) will not be required to withhold tax on payments to its account holders, provided that it reports on U.S. accounts to its home jurisdiction (which, in turn, will share such information with the IRS pursuant to the Model 1 IGA). On the other hand, if a “Model 2 IGA” applies to a jurisdiction, an FFI in that jurisdiction must still enter into an FFI agreement directly with the IRS to be treated as a “participating FFI” that is not subject to withholding and, as a result, will still be required to report certain information on U.S. accounts directly to the IRS (with supplemental information shared with the IRS via the FFI’s home jurisdiction under the Model 2 IGA). To date, the United States has signed IGAs with the governments of Denmark, Germany, Ireland, Japan, Mexico, Norway, Spain, Switzerland, and the United Kingdom, and is reportedly in varying levels of discussions regarding IGAs with more

1. View the Notice at <http://www.irs.gov/pub/irs-drop/n-13-43.pdf>.

2. The actual IGAs entered into between the United States and particular jurisdictions may deviate from the models in some cases. In addition, there are subgroups within each model IGA that provide for either reciprocal versus nonreciprocal information sharing.

than 50 other countries, including the Cayman Islands.<sup>3</sup>

## Revised Timelines

The following is a summary of the key timeline revisions provided for in the Notice:

- **Withholding.** Withholding on interest, dividends, and other types of U.S. source income potentially subject to FATCA begins on **July 1, 2014**. (Previously, withholding was scheduled to begin with respect to payments of such income on or after January 1, 2014.) FATCA withholding on gross proceeds and “passthru” payments remains unchanged, applying to such payments made on or after January 1, 2017 at the earliest.
- **New account opening procedures.** FFIs must implement new account opening procedures by the later of **July 1, 2014** or the effective date of the FFI’s agreement with the IRS.
- **“Preexisting Obligations.”** The Notice generally provides that the definition of “preexisting obligations” (e.g., financial accounts, debt, and equity interests) in the final regulations will be revised to include those accounts established on or before **June 30, 2014**. In the case of a participating FFI, preexisting obligations include those that are outstanding as of the date of the FFI agreement. For “registered deemed compliant FFIs,” preexisting accounts are accounts established prior to the later of **July 1, 2014** or the registration of the FFI with the IRS/receipt of the global intermediary identification numbers (GIINs). In addition, the deadlines for completing diligence on preexisting obligations are generally postponed by six months. The Notice also specifies that, for purpose of determining the appropriate level of review for an account, account balances or values will be measured initially as of **June 30, 2014**. A similar six-month delay will apply to the diligence timelines under an applicable IGA.
- **Reporting on U.S. accounts.** The first reporting deadline remains **March 31, 2015**, but the Notice provides that reporting is now only required with respect to the 2014 calendar year. This same date also applies to FFIs covered by a Model 1 IGA. Previously, the first report was to include information for the 2013 calendar year.
- **Registration with the IRS.** The Notice projects that the IRS FATCA registration portal will open on August 19, 2013. (It was previously expected to open in mid-July). No GIINs will be issued in 2013, but issuance of GIINs will begin in 2014. The Notice states that the first FFI list (e.g., the list of FFIs that have registered with the IRS) is to be published by June 2, 2014. Therefore, in order to be included on the first FFI list, an FFI **must complete its registration by April 25, 2014**.
- **Registration by “Model 1 IGA” FFIs.** The Notice provides that a “registered deemed compliant FFI” (e.g., an FFI located in a Model 1 IGA jurisdiction) will not need to obtain a GIIN until **January 1, 2015** since withholding agents will no longer be required to verify GIINs in connection with payments to Model 1 IGA FFIs prior to January 1, 2015. Although a Model 1 IGA FFI is relieved from the obligation to enter into an FFI agreement with the IRS, the Notice clarifies that such an FFI will need to register with the IRS and obtain a GIIN by January 1, 2015 in order to certify its status as a “registered deemed compliant FFI” to a withholding agent, therefore avoiding any FATCA withholding on payments received after January 1, 2015.
- **Extended validity of current withholding certificates and certain agreements.** IRS Forms W-8 that are scheduled to expire on December 31, 2013 and are used for purposes of non-FATCA withholding will remain valid until **June 30, 2014**, so as to coincide with the extended start date for FATCA withholding. In addition, all “qualified intermediary,” “withholding partnership,” and “withholding trust” agreements that are set to expire on December 31, 2013 are now extended to June 30, 2014.
- **Grandfathered obligations.** Debt obligations (and associated collateral) outstanding as of **July 1, 2014** will be exempt from FATCA withholding. Previously, such instruments needed to be outstanding as of January 1, 2014 in order to be treated as grandfathered.

## IGAs Deemed to Be in Effect

The Notice also provides that a jurisdiction will be treated as having an IGA “in effect” with the United States if the

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3. The Cayman Islands announced on March 15, 2013 that it would adopt a “Model 1” IGA with the United States.

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jurisdiction is designated on a Treasury website, even if such jurisdiction has not yet brought into force an IGA. In general, the Treasury intends to include on this list jurisdictions that have signed but have not yet brought into force an IGA. If an FFI is located in a jurisdiction that is on this Treasury list, it will be permitted to register with the IRS as a “registered deemed compliant FFI” (which includes FFIs in Model 1 IGA jurisdictions) or as a “participating FFI” (for FFIs in Model 2 IGA jurisdictions). A jurisdiction may be removed from the “deemed IGA” list if it fails to perform the steps needed to bring the IGA into force within a reasonable amount of time. This revision provides greater certainty to FFIs located in jurisdictions that are in talks with the United States regarding a potential IGA but where an IGA may not be effective prior to the time when withholding begins.

## Contacts

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